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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,
DEPARTMENT OF HEALTH, STATE
OF HAWAII,

Plaintiffs,

v.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII

Defendant.

CIVIL ACTION NO.

CONSENT DECREE
WITH APPENDICES A - G

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1 The United States of America, on behalf of the United States Environmental Protection
2 Agency ("EPA"), has filed a Complaint in this matter alleging that the Hawai'i Department of
3 Transportation ("HDOT") has violated provisions of the Clean Water Act ("Act"), 33 U.S.C.
4 §§1251– 1387, and the regulations promulgated pursuant to the Act, including the conditions and
5 limitations of the Hawai'i General Construction Activities Storm Water Permit, HAR 11-55
6 Appendix C; the Hawai'i General Industrial Activities Storm Water Permit, HAR 11-55
7 Appendix B; HDOT's Honolulu International Airport NPDES permit, Permit No. HI0021440;
8 and HDOT's Municipal Separate Storm Sewer System NPDES permit ("MS4") for Oahu, Permit
9 No. HI0021245 (to be reissued as No. HIS000001). The State of Hawai'i, on behalf of the
10 Hawai'i Department of Health ("DOH"), joined in the Complaint to bring claims against
11 Defendants for violations of State law.

12 The Parties recognize, and the Court by entering this Consent Decree finds, that this
13 Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between
14 the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

15 NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without
16 adjudication or admission of any issue of fact or law, and upon consent and agreement of the
17 Parties, it is hereby ADJUDGED, ORDERED, AND DECREED as follows:

18 **I. GENERAL PROVISIONS**

19 1. Jurisdiction and Venue. This Court has jurisdiction over the subject matter of this
20 action and over the parties pursuant to 33 U.S.C. §§1319 & 1365 and pursuant to 28 U.S.C.
21 §§ 1331, 1345, 1355 & 1367. The Complaint states claims upon which relief may be granted
22 under 33 U.S.C. §1319 and under applicable provisions of State law. Venue is proper in this
23 District under 33 U.S.C. § 1319(b) and under 28 U.S.C. §§ 1391(b) and (c) & 1395(a), because
24 the defendant may be found here and because the transactions and occurrences giving rise to the
25 Complaint occurred here. For purposes of the Decree, HDOT consents to and will not contest
26 the Court's exercise of personal jurisdiction over HDOT or venue in this District.

1 2. Parties Bound. The obligations of this Consent Decree apply to and are binding
2 upon the United States and DOH and upon HDOT and any successors agencies or other entities
3 or persons otherwise bound by law. Within 10 business days of entry of this Decree, HDOT shall
4 provide a copy of this Decree to each Manager, each Project Superintendent, and each firm
5 retained by HDOT to implement this Decree. If, more than 10 business days after entry of this
6 Decree, a Manager, Project Superintendent, or other person or firm becomes an employee of
7 HDOT or is retained by HDOT to implement provisions of this Decree, HDOT shall provide
8 such person or firm a copy of the Decree within 10 business days of such employment or
9 retention.

10 3. Definitions. Except as specifically provided in this Decree, definitions for the
11 terms used in this Decree shall be incorporated from the Clean Water Act and the regulations
12 promulgated pursuant to the Act. Whenever terms listed below are used in this Decree, the
13 following definitions apply:

14 a. “Acceptable evidence”, for the purposes of Paragraphs 21.c and 24.b,
15 below includes invoices, purchase orders, or other documentation that specifically
16 identifies and itemizes the individual costs of the goods or services for which payment is
17 made. Canceled drafts do not constitute acceptable evidence unless such drafts
18 specifically identify and itemize the individual costs of the goods or services for which
19 payment is made.

20 b. Best Management Practices (“BMPs”) shall have the meaning set forth in
21 40 C.F.R. § 122.2 which states that BMPs “mean schedules of activities, prohibitions of
22 practices, maintenance procedures, and other management practices to prevent or reduce
23 the pollution of ‘waters of the United States’.” BMPs also include treatment
24 requirements, operating procedures, and practices to control plant site runoff, spillage or
25 leaks, sludge or waste disposal, or drainage from raw material storage.”
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1 c. BMP Program Plan ("BMPPP") shall mean a programmatic chapter under
2 the Storm Water Management Program Plan ("SWMPP") that meets the terms and
3 conditions of the MS4 permit and the requirements of Section V of this Consent Decree
4 (Injunctive Relief).

5 d. "Clean Water Act" or "Act" shall mean the Federal Water Pollution
6 Control Act, as amended, 33 U.S.C. §§ 1251-1387.

7 e. "Connection Permit" shall mean a permit issued by HDOT for physical
8 connections into its Oahu MS4.

9 f. "Critical deficiencies" for purposes of Paragraph 10.g.(2) shall mean those
10 deficiencies that pose an immediate threat for the discharge of pollutants to the storm
11 drain system, surface waters, or State waters. Critical deficiencies include, but are not
12 limited to, the following examples:

13 (1) Any observed discharge, or evidence of discharge, of untreated
14 storm water or non-storm water to the storm drain system, surface waters, or State
15 waters generated by the construction activity.

16 (2) Absence of linear barriers and/or perimeter controls required by the
17 BMP Plan.

18 (3) There are identified storm drain inlets, surface waters, or State
19 waters within or adjacent to the project site in close proximity to disturbed soil
20 areas without control measures in place that pose an immediate threat of untreated
21 storm water discharges.

22 (4) Work in an active stream channel or other surface water body
23 without proper implementation of required BMPs.

24 (5) Presence of any spilled oil or hazardous materials near to
25 unprotected storm drain inlet, surface waters, or State waters.

g. “Day” shall mean a calendar day unless otherwise specified to be a working day. “Business Day” shall mean a day other than a Saturday, Sunday, State or Federal legal holiday. In computing a prescribed period of time, the day of the event shall not be included. If a stated time period expires on a Saturday, Sunday, State or Federal legal holiday, it shall be extended to include the next working day.

h. “Discharge Permit” shall mean a permit issued by HDOT for discharges into its Oahu MS4.

i. “DOH” shall mean the Hawai‘i Department of Health and any of its successor departments, agencies, or instrumentalities.

j. “Encroachment permit project” shall mean a construction project undertaken by a third party within one of HDOT’s rights-of-way and that requires the issuance by HDOT of a “Permit to Perform Work Upon State Highways”.

k. “EPA” shall mean the United States Environmental Protection Agency and any of its successor departments, agencies, or instrumentalities.

1. “General Construction Activities Storm Water Permit” refers to the permit issued by DOH for Construction Activities, HAR 11-55 Appendix C.

m. “General Industrial Activities Storm Water Permit” refers to the permit issued by DOH for Industrial Activities, HAR 11-55 Appendix B.

n. "High Priority Watersheds" shall mean those depicted at Appendix A which is incorporated herein by reference.

o. “Industrial Activity” shall have the meaning set forth in 40 C.F.R. § 122.26(b)(14)(i)-(xi), excluding 40 C.F.R. § 122.26(b)(14)(x).

p. "Inspection" for purposes of Paragraph 10.k.(2) shall mean, at a minimum,

(1) Visual inspection of the inlet(s) and/or point of connection to the MS4 for evidence of the presence of pollutants or other illegal discharges;

(2) Visual inspection of the tributary area for potential sources of pollutants exposed to stormwater and the presence of BMPs, if any, employed to prevent the discharge of those pollutants to the MS4; and

(3) Discussion with a facility representative to ensure that they know the difference between allowable discharges to the MS4 and pollutant discharges which are not allowed to be discharged to the MS4.

q. “Major deficiencies” for purposes of Paragraph 10.g.(2) shall mean those deficiencies that are significant problems which could result in the discharge of pollutants to the storm drain system, surface waters, or State waters. Major deficiencies include, but are not limited to, the following examples:

(1) No Best Management Practices (BMP) Plan or NPDES permit (if required).

(2) Linear barriers and/or perimeter controls in areas tributary to a water body or drain inlet are installed as required by the BMP Plan, but are not functional. This includes silt fences that are not anchored properly, have collapsed, been driven over or overwhelmed by accumulated sediment.

(3) Hazardous materials or waste is stored within the project without containment or implementation of BMPs.

(4) Oil, fuel, or brake or transmission fluid spills covering more than one square yard and/or adjacent to protected storm drain inlets, surface waters, or State waters.

(5) Any discharge of sediment or other deleterious material resulting from dewatering operations conducted without implementation of required BMPs for dewatering.

(6) Sediment tracking more than 50 feet from project ingress/egress location(s).

1 (7) Expansion of the active disturbed soil area limit without written
2 approval.

3 (8) Soil stabilization and sediment controls are not installed in
4 accordance with applicable construction site BMP Plan.

5 (9) Sediment controls are installed in accordance with the BMP Plan,
6 but there is a large unstabilized disturbed soil area with insufficient controls
7 downgradient to prevent the discharge of untreated storm water to the storm drain
8 system, surface waters, or State waters if a rain event generates runoff.

9 (10) Dust from project site visibly blowing off the site and into storm
10 drain conveyances or adjacent surface water bodies.

11 r. "Master Consultant" shall mean the consultant or consultants procured by
12 HDOT in order to provide various functions in support of the requirements of this
13 Consent Decree.

14 s. "Minor deficiencies" for purposes of Paragraph 10.g.(2) shall mean those
15 deficiencies that do not pose a threat for discharge of untreated storm water or pollutants
16 to the storm drain system, surface waters, or State waters, but are not in strict
17 conformance with the SWPPP or BMP Plan. Minor deficiencies include, but are not
18 limited to, the following examples:

19 (1) BMP Plan does not reflect current operations and an amendment is
20 recommended.

21 (2) BMPs are not deficient, but are not consistent with the BMP Plan.

22 (3) Linear barriers and/or perimeter controls are installed as required
23 by the BMP Plan, but require minor maintenance. For example, a silt fence which
24 is not anchored properly throughout the entire length or an inlet protection device
25 with some accumulated silt.

1 (4) Soil stabilization or sediment controls are installed as required by
2 the BMP Plan, but not properly maintained.

3 (5) Site inspections by project staff are not being conducted at the
4 required frequencies.

5 (6) Non-storm water or waste management BMPs improperly
6 maintained.

7 (7) Oil, fuel, or brake or transmission fluid spills covering less than
8 one square yard and not adjacent to storm drain inlets, surface waters, or State
9 waters.

10 (8) Evidence of active wind erosion on unstabilized slopes/stock piles.

11 (9) Minor tracking less than 50 feet from project ingress/egress
12 locations.

13 (10) Major deficiencies which are corrected prior to the inspector
14 leaving the site.

15 t. "MS4 Permit" refers to the NPDES permit issued by DOH to HDOT
16 Highways Division for discharges from HDOT's municipal separate storm sewer system
17 on the Island of Oahu and designated as Permit No. HI0021245 and to be reissued as No.
18 HIS000001.

19 u. "Notice of Intent" shall mean a request for coverage under a General
20 Permit.

21 v. "Parties" means the United States, on behalf of EPA; the State, on behalf
22 of DOH; and HDOT.

23 w. "Responsible Officer" shall mean an official of HDOT in charge of storm
24 water program functions for either the Highways Division or the Airports Division, or any
25 other person who performs similar policy or decision making functions for HDOT and is
26 authorized as set forth at 40 C.F.R. § 122.22.

x. "SEPs" shall mean the Supplemental Environmental Projects to be performed under this Decree and more fully described in Section VII, below.

y. "Service Contractor" shall mean the contractor or contractors procured by HDOT in order to provide various services in support of the requirements of this Consent Decree.

z. "Site" shall mean any location in the State of Hawai'i that HDOT owns, leases, or operates, and at which there is or will be construction resulting in ground-disturbing activities greater than or equal to one acre or that is otherwise subject to the NPDES storm water construction regulations set forth at 40 C.F.R. § 122.26(b)(14)(x) or 40 C.F.R. § 122.26(b)(15).

aa. Site-Specific BMP Plan shall mean a plan for controlling pollutants in storm water discharges from Sites that meets the requirements of the General Construction Activities Storm Water Permit and Section V of this Consent Decree.

bb. "State" shall refer to the State of Hawai'i.

cc. "SWPCP" shall mean a Storm Water Pollution Control Plan, a plan for controlling pollutants in storm water discharges from locations that meets the requirements of the General Industrial Activities Storm Water Permit and Section V of this Consent Decree.

dd. "SWMPP" shall mean a Storm Water Management Program Plan developed and implemented as required by HDOT's MS4 permit and modified as required by this Consent Decree.

II. COMPLIANCE WITH THE CLEAN WATER ACT

4. HDOT shall fully comply with all requirements of the Clean Water Act, as well as with the terms and conditions of all applicable NPDES Permits, including the Highways Division Oahu District Municipal Separate Storm Sewer System ("MS4") permit; the Honolulu International Airport NPDES permit, Permit No. HI0021440; the Hawai'i General Industrial

Activities Storm Water permit, HAR 11-55 Appendix B; and the Hawai'i General Construction Activities Storm Water permit, HAR 11-55 Appendix C.

III. APPROVAL PROCESS

5. Approval of Deliverables. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA and DOH shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

a. If the submission is approved pursuant to Paragraph 5.(a), HDOT shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part, pursuant to Paragraph 5.(b) or (c), HDOT shall, upon written direction of EPA and DOH, take all actions required by the approved plan, report, or other item that EPA and DOH determine are technically severable from any disapproved portions, subject to HDOT's right to dispute only the specified conditions or the disapproved portions, under Section X of this Decree (Dispute Resolution).

b. If the submission is disapproved in whole or in part pursuant to Paragraph 5.(c) or (d), HDOT shall, within 30 business days or such other time as agreed to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, HDOT shall proceed in accordance with the preceding Subparagraph.

6. Any Stipulated Penalties applicable to the original submission, as provided in Section VIII of this Decree, shall accrue during the 30-day period or other period specified for resubmission, but shall not be payable unless the resubmission is untimely or is disapproved in whole; provided that, if the original submission was so deficient as to constitute a material breach

1 of HDOT's obligations under this Decree, the Stipulated Penalties applicable to the original
2 submission shall be due and payable notwithstanding any subsequent resubmission.

3 7. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in
4 whole or in part, EPA and DOH may again require HDOT to correct any deficiencies, in
5 accordance with the preceding Paragraphs, or may itself correct any deficiencies, subject to
6 HDOT's right to invoke Dispute Resolution and to the right of EPA and DOH to seek Stipulated
7 Penalties as provided in the preceding Paragraphs.

8 **IV. CERTIFICATION OF REPORTS AND SUBMISSIONS**

9 8. Except as otherwise expressly provided in this Consent Decree, any report or
10 other document submitted by HDOT pursuant to this Decree that makes any representation
11 concerning compliance or noncompliance with any requirement of this Decree, the Act or its
12 implementing regulations, or any applicable permit, shall be certified by a Responsible Officer of
13 HDOT. The certification shall be in the following form:

14 I certify under penalty of law that I have examined and am familiar with the
15 information submitted in this document and all attachments and that this
16 document and its attachments were prepared either by me personally or under my
17 direction or supervision in a manner designed to ensure that qualified and
18 knowledgeable personnel properly gather and present the information contained
19 therein. I further certify, based on my personal knowledge or on my inquiry of
those individuals immediately responsible for obtaining the information, that the
information is true, accurate and complete. I am aware that there are significant
penalties for submitting false information, including the possibility of fines and
imprisonment for knowingly and willfully submitting a materially false statement.

20 **V. INJUNCTIVE RELIEF**

21 Highways Division Oahu District MS4

22 Compliance with December 2003 SWMPP and Additional Requirements

23 9. Upon entry of this Consent Decree, HDOT shall fully and completely implement
24 its December 2003 Storm Water Management Program Plan ("SWMPP"). In addition, HDOT
25 shall also comply with the additional requirements set out below at Paragraphs 9.a - 9.g. For
26 each of these additional requirements, HDOT shall make and submit the necessary modifications
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1 to its SWMPP and implement those modifications upon submittal. HDOT shall make additional
2 modifications as requested by EPA and DOH, in accordance with Section III (Approval Process).

3 a. Debris Removal Best Management Program

4 (1) Within 60 days of entry of this Consent Decree HDOT shall
5 modify, and implement accordingly, the Street Sweeping Schedule as set out as
6 Table II-1 of the December 2003 SWMPP so as to provide for the sweeping of all
7 state highway segments on Oahu (shoulders and medians) at least as frequently as
8 set forth in this Paragraph. A list of roadway segments and their respective
9 minimum sweeping frequencies is set out at Appendix B and incorporated herein
10 by reference. HDOT may propose revisions to this modified Street Sweeping
11 schedule when it submits the revised SWMPP in accordance with Paragraph 10.f
12 below.

13 (2) Within 60 days of entry of this Consent Decree, HDOT shall
14 modify, and implement accordingly, the Storm Drainage Structure Inspection
15 Schedule as set out as Table II-2 of the December 2003 SWMPP so as to provide
16 for the inspection and necessary cleaning, as provided for at Pages DR3-1 and
17 DR3-2, of all state highway storm drainage system gutters, swales, open channels/
18 ditches, culverts, drain inlets, catch basins, manholes, outfalls, and other
19 accessible discharge points that are appurtenant to all state highway segments on
20 Oahu according to the requirements of this Paragraph. The minimum inspection
21 and cleaning frequencies required by this Subparagraph are set out at Appendix C
22 and incorporated herein by reference. HDOT may propose revisions to this
23 modified Storm Drainage Structure Inspection Schedule when it submits the
24 revised SWMPP per Paragraph 10.f, below.

25 (3) Within two years of entry of this Consent Decree, HDOT shall
26 develop and implement a comprehensive asset management system for the Oahu
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District's storm drain system and related appurtenances, including maintenance equipment, to ensure appropriate debris removal and system maintenance. The asset management system shall include justification of its priorities on the basis of potential impacts to water quality and shall, at a minimum, include identification of the number and location of all drain inlets and outfalls. HDOT shall use this asset management system to establish priorities and to schedule and track appropriate system maintenance and debris removal program activities, such as street sweeping, catch basin cleaning, and green waste and accumulated soil removal. The asset management system shall be included in the modified SWMPP upon its completion.

b. Construction Activities BMP Program

(1) Within 90 days after entry of this Decree, HDOT shall provide a copy of the current edition of the City and County of Honolulu's "Best Management Practices Manual for Construction Sites in Honolulu" ("CCH Manual"), to all appropriate staff involved in construction, including contractors and in-house employees (including employees of the Maintenance Section who are either directly or indirectly involved in the implementation of activities under either the SWMPP and/or this Consent Decree), those involved in work done pursuant to encroachment permits, and those involved in erosion control projects. For the purposes of this Subparagraph, it shall be sufficient for HDOT to provide to the offices listed in Appendix G, at a minimum, the number of CCH Manuals specified in Appendix G. Within 90 days after entry of the Consent Decree, any Contractor (either professional consultant or construction contractor) involved with construction at HDOT facilities or within State Highways rights-of-way shall be required to obtain the CCH Manual.

1 (2) HDOT shall provide annual training on the Construction BMP
2 Program Plan to all staff with construction storm water responsibilities, including
3 construction engineers, maintenance staff, and plan reviewers. This training shall
4 be specific to HDOT activities (including the proper installation and maintenance
5 of approved BMPs), policies, and procedures. The first annual training shall be
6 conducted by no later than September 15, 2005 or within 30 days after entry of
7 this Decree, whichever is later.

8 (3) Beginning 30 days after entry of this Decree, HDOT shall not
9 allow construction to commence on any contract, in-house, or encroachment
10 permit project unless and until it (a) has verified that the project has received from
11 DOH a Notice of General Permit Coverage under the Hawai'i General
12 Construction Activities Storm Water permit (unless the project will disturb less
13 than one acre of land) and has satisfied any other applicable requirements of the
14 Hawai'i NPDES permit program, and (b) has reviewed the applicable Site-
15 Specific BMP Plan to verify that it fully meets all requirements of the following,
16 to the extent that they are applicable: (i) HDOT's Standard Provisions (Sections
17 107.17 and 209); (ii) Water Pollution and Erosion Control Notes; (iii) NPDES
18 Requirements for Permit Projects Within State Highway Right-of-Way Notes; (iv)
19 the General Construction Activities Storm Water NPDES permit; and (v) any
20 other applicable requirements of the Hawai'i NPDES permit program. For
21 encroachment permit projects, HDOT shall only be responsible for the activities
22 described in Subparagraphs 9.b.(1) and 9.b.(3) above, for work that occurs within
23 HDOT rights-of-way.

24 (4) Within 10 business days after entry of this Decree, HDOT shall
25 submit for approval a checklist that its reviewers shall use in evaluating the BMP
26 plans pursuant to this Paragraph. Upon approval, HDOT shall provide copies of
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1 this checklist to applicants for encroachment permits and to contractors for their
2 use in developing construction Site-Specific BMP Plans for HDOT-contracted
3 construction projects.

4 (5) Upon entry of this Decree, prior to the initiation of ground-
5 disturbing activities at any Site, except for activities associated with the
6 installation of BMPs at a Site, no other construction activities may commence
7 until an HDOT engineer (or an engineer retained by HDOT) or qualified inspector
8 reviews and becomes familiar with the projects' site-specific BMP plan and
9 inspects the Site to determine whether the BMPs required by the BMP plan have
10 been installed correctly and in the correct locations. The engineer or qualified
11 inspector who conducts this inspection shall document that the BMPs required by
12 the BMP plan have been installed correctly and in the correct locations prior to the
13 commencement of any other ground-disturbing activity.

14 c. Chemical Applications BMP Program. Within 60 days after entry of this
15 Decree, HDOT shall develop and implement a specific training program, for all potential
16 appliers (bulk and hand-held) of fertilizers, pesticides, and herbicides, in the proper
17 application of those substances. HDOT shall not permit the application of fertilizers,
18 pesticides, or herbicides unless the applier has first received this training.

19 d. Erosion Control BMP Program. Within 180 days after entry of this
20 Decree, HDOT shall submit for approval a plan for the completion of high priority
21 erosion control projects on all of the sites listed in Appendix D which is incorporated
22 herein by reference. This plan shall include for each site, at a minimum: the proposed
23 erosion control methodology to be utilized; construction schedule; cost estimate;
24 completion criteria; and a schedule for post-completion inspection and maintenance. All
25 erosion control projects to be done under this Subparagraph shall be completed by no
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1 later than two years after entry of this Decree. HDOT shall continue to perform
2 maintenance activities on completed projects as necessary.

3 e. Maintenance Facilities BMP Program

4 (1) Within 90 days after entry of this Decree, HDOT shall develop and
5 implement, for each maintenance baseyard located on Oahu, a site-specific
6 SWPCP that includes, among other things, a detailed site plan, site description,
7 and facility layout, description of potential pollutant sources, site-specific BMPs,
8 inspection procedures, and spill cleanup procedures. An individual at each facility
9 (e.g., yard foreman) shall be charged with ensuring implementation of the
10 SWPCP. This individual shall be trained to conduct inspections and identify areas
11 for BMP improvement. To ensure consistency and provide assistance and
12 oversight, HDOT shall identify an individual, also trained to conduct inspections
13 and identify areas for BMP improvement and independent of any specific
14 baseyard, who shall conduct inspections of all six baseyards at least quarterly.

15 (2) HDOT shall develop and implement a formal storm water
16 awareness training program for Oahu District Maintenance supervisors and staff
17 that identifies potential sources of pollution, general BMPs that can be used to
18 reduce or eliminate such sources, and specific BMPs for the District's facilities
19 and activities. The training shall incorporate elements of the public education
20 campaign being implemented by the City and County of Honolulu and shall
21 educate staff that they serve a role in protecting water quality. Maintenance
22 supervisors and staff shall be made aware of the NPDES permit, the overall
23 SWMPP, the SWPCP for their baseyard, and the applicable BMPPP(s). HDOT
24 shall conduct the first round of this training by no later than September 15, 2005
25 or within 30 days after entry of this Decree, whichever is later.

26 f. New Development and Significant Redevelopment BMP Program Plan

(1) Within 90 days of the commencement of services by the Master Consultant, or within 180 days of entry of this Decree, whichever comes first, HDOT shall develop and implement specific criteria establishing when permanent post-construction BMPs must be included in project design to address storm water impacts and pollutants of concern. These criteria shall take into consideration, among other things, potential water quality impacts anticipated from the permanent post-construction conditions. Permanent post-construction BMPs to be considered shall include those designed to treat storm water runoff and other structural type devices.

(2) Upon approval of the criteria established under Paragraph 9.f.(1), above, HDOT shall not advertise any construction project or award any construction contract unless and until the project design has been reviewed to ensure that appropriate permanent post-construction BMPs have been included in the project design and are included in the bid package. No project shall proceed without the inclusion of appropriate permanent post-construction BMPs unless there is specific documentation demonstrating that such post-construction BMPs are not practicable. For the purposes of this Paragraph and for a period not to exceed 60 days after approval of the criteria, matters concerning the timing or scheduling of a project may be considered as a reason that post-construction BMPs are not practical for inclusion in the project design. Project documents for projects that will include installation of permanent post-construction BMPs shall also include appropriate requirements for their future continued maintenance.

(3) Upon approval of the criteria established under Paragraph 9.f.(1), HDOT shall not issue any encroachment, discharge, or connection permit for any project that requires NPDES permit coverage under the General Construction Activities Storm Water Permit unless and until the project design has been

1 reviewed to ensure that appropriate permanent post-construction BMPs have been
2 included in the project design and are included in the permit application package.
3 No encroachment, discharge, or connection permit shall be issued without the
4 inclusion of appropriate permanent post-construction BMPs unless there is
5 specific documentation demonstrating that such post-construction BMPs are not
6 practicable. Permit documents for applications that will include installation of
7 permanent post-construction BMPs shall also include appropriate requirements for
8 their future continued maintenance.

9 g. Illicit Connection / Illegal Discharge Elimination Program

10 (1) HDOT shall complete follow-up investigations on all industrial,
11 commercial, and high-density residential parcels discharging to HDOT's MS4 that
12 are indicated in the December 2000 Storm Water Questionnaire Survey of Parcels
13 Adjacent to Highway Rights-of-Way ("Questionnaire Survey"). Follow-up
14 investigations shall be ranked as follows: parcels identified in the Questionnaire
15 Survey as priorities 1-4 shall be considered as Tier 1 parcels; parcels identified as
16 priorities 5-16 shall be considered as Tier 2 parcels; and parcels identified as
17 priorities 17-30 shall be considered as Tier 3 parcels. Each such investigation
18 shall be deemed completed upon either (a) the issuance of a discharge or
19 connection permit, or (b) sufficient documentation to support a conclusion that no
20 discharge or connection permit is necessary because (i) there is no physical
21 connection present, or (ii) the only potential discharges from non-industrial
22 activities are by overland sheet flow. Tier 1 investigations shall be completed
23 within 18 months after entry of this Decree. All Tier 2 and Tier 3 investigations
24 shall be completed within 3 years after entry of this Decree.

25 (2) Within 60 days after entry of this Decree, HDOT shall transmit to
26 DOH full electronic and paper copies of its survey parcel database, sorted by SIC
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code. HDOT shall provide electronic and paper updates to this list, reflecting outcomes of the investigations discussed above, on an annual basis in its Annual Report.

SWMPP Revisions

10. HDOT shall revise and submit for approval its Oahu District Storm Water Management Program Plan ("SWMPP") to incorporate the requirements set out at Paragraphs 9.a - 9.g, above, and at Paragraphs 10.a - 10.k, below. Unless specified otherwise, HDOT shall submit the revised SWMPP within 240 days of the commencement of services by the Master Consultant, or within one year of entry of this Decree, whichever comes first. Upon its submittal, HDOT shall fully and completely implement all parts of the revised SWMPP, which shall supersede the December 2003 SWMPP. HDOT shall make additional modifications as requested by EPA and DOH, in accordance with Section III (Approval Process).

a. Storm Water Management Program Structure. HDOT shall revise its SWMPP to include a formal storm water management program structure for the Oahu District MS4 program that includes, at a minimum, designated storm water contacts for each Highways Division branch, program, and field office, as appropriate. An organization chart to reflect this structure shall also be developed and submitted. For each designated contact, HDOT shall include a description of the position's roles and responsibilities for the storm water program. HDOT shall hold monthly meetings with these contacts to discuss implementation and evaluation of the storm water program. HDOT shall maintain copies of the sign-in sheets for these meetings in accordance with Paragraph 52, below, and these shall be made available to EPA and DOH upon request.

b. Measurable Goals. HDOT shall revise its SWMPP to include a combination of both direct and indirect objective, quantitative standards ("measurable goals") that can be used to measure progress under each specific program element in its SWMPP. In its SWMPP, HDOT shall incorporate the specific measurable goals

1 identified in other parts of this Consent Decree in addition to developing other
2 appropriate measurable goals.

3 c. Training and Education

4 (1) HDOT shall revise its SWMPP to establish a training program
5 such that all HDOT staff and management involved in storm water management
6 activities shall receive at least annual storm water training in the requirements of
7 each program element for which they have responsibility. This training program
8 shall include, at a minimum, for each program element: (a) identification and
9 qualifications of the trainers; (b) training in, at a minimum for each program
10 element, the following topic areas: review of applicable measurable goals; the
11 selection and implementation of appropriate BMPs; and review of storm water
12 regulations, permits, and the terms of this Consent Decree; and (c) appropriate
13 documentation of training activities.

14 (2) To the extent that HDOT utilizes contractors, with the exception of
15 general contractors used to construct contract construction projects, to implement
16 any SWMPP activities, HDOT shall require that such contractors receive training
17 equivalent to that included in HDOT's training program in all applicable areas.

18 (3) No less than annually, HDOT shall offer appropriate storm water
19 runoff management training to general contractors and subcontractors used to
20 construct HDOT's contract construction projects. Such training shall emphasize
21 sediment and erosion control requirements and BMPs (Chapter 2 in the CCH
22 manual), but shall additionally cover, in appropriate detail, requirements and
23 BMPs for all of the other Contractor Activities covered in Chapter 1 of the CCH
24 Manual.

25 (4) Prior to the issuance of any Notice to Proceed, or the equivalent, to
26 any contractor on any contract construction project, HDOT shall hold a
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1 preconstruction meeting with the project's prime contractor during which the
2 requirements of the General Construction Activities Storm Water Permit shall be
3 discussed, as well as (a) Standard Provisions (Sections 107.17 and 209); (b)
4 "Water Pollution and Erosion Control Notes"; and (c) the applicable requirements
5 of this Consent Decree.

6 d. Monitoring of Program Effectiveness. HDOT shall revise its SWMPP to
7 include a discussion of specific activities to be undertaken in order to assess BMP
8 effectiveness, including an evaluation of success in achieving measurable goals and a
9 discussion of available and applicable water quality monitoring data. Assessments of
10 program effectiveness shall be conducted at least annually and be reported in HDOT's
11 End-of-Year Reports.

12 e. Reporting. HDOT shall revise its SWMPP to include a description of
13 reporting procedures and activities, including schedules and proposed content of semi-
14 annual and annual reports such that, at a minimum, the following is reported for each
15 storm water program element (BMP Program) in each Mid-Year and End-of-Year Report:

16 (1) Requirements: description of what HDOT was required to do
17 (permit requirements, EPA or DOH orders for compliance, or other commitments
18 set forth in the SWMPP and this Consent Decree);

19 (2) Past Year Activities: description of activities over the reporting
20 period including, where applicable, progress accomplished toward meeting
21 specific measurable goals or other specific performance requirements and
22 including, when requirements were not fully met, a detailed explanation as to why
23 HDOT did not meet its commitments for the reporting period;

24 (3) Future Activities: description of planned activities including,
25 where applicable, specific activities to be undertaken during the next reporting
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1 period toward accomplishing specific measurable goals or other specific
2 performance requirements;

3 (4) Resources: report on the status of HDOT's resource base for
4 implementing both this Consent Decree and HDOT's NPDES permit during the
5 applicable reporting period, together with an estimate of the resources over and
6 above those required in the current reporting period that will be required in the
7 next reporting period.

8 f. Debris Removal Best Management Practices Program. HDOT shall revise
9 its SWMPP to develop procedures and a schedule for inspections of:

10 (1) all state highways on Oahu for the purpose of identifying whether
11 sweeping or brooming of roadways, shoulders, or medians is needed, and

12 (2) all state highway storm drainage system catch basins, gutters and
13 open ditches, trenches, and storm drains on Oahu for the purpose of identifying
14 whether cleaning of such structures is needed.

15 In both cases identified in the preceding Subparagraphs, the need for sweeping, brooming, or
16 structure cleaning shall, in addition to other criteria, be determined based upon material
17 accumulation rates and potential threat of discharges to waters of the United States that may have
18 an effect on water quality. The schedule shall provide that each highway mile and storm
19 drainage feature is inspected at least once annually, but that highway segment drainages and their
20 associated storm features that are located in High Priority Watersheds shall be inspected at least
21 semiannually. The adopted procedures shall also provide for the identification of other highway
22 segments (in addition to those located in High Priority Watersheds) and their associated storm
23 drainage features that may require more frequent sweeping, brooming, or structure cleaning
24 based upon material accumulation rates and potential threat of discharges to waters of the United
25 States that may have an effect on water quality. The procedures shall establish debris
26 accumulation thresholds above which sweeping, brooming, or structure cleaning must occur.

g. Construction Activities BMP Program.

(1) HDOT shall revise the following documents to require use of the CCH Manual and the City and County of Honolulu’s “Rules for Soil Erosion Standards and Guidelines,” April 1999: (a) Standard Provisions (Sections 107.17 and 209); (b) “Water Pollution and Erosion Control Notes”; and (c) “NPDES Requirements for Permit Projects Within State Highway Right-of-Way Notes.” These revised documents shall be used, to the extent applicable, on all contract, in-house, and encroachment permit construction projects on Oahu. HDOT shall incorporate these revised documents, either explicitly or by reference, into its revised SWMPP.

(2) HDOT shall revise its SWMPP to specify mandatory minimum project inspection and enforcement requirements for use at all construction sites as follows:

(a) In addition to inspections required by the Hawai'i General Construction Activities Storm Water permit, and as otherwise required under the Hawai'i NPDES permit program, all in-house and contract construction projects shall be inspected at least monthly by a qualified construction inspector who is independent (i.e., not involved in the projects' day-to-day planning, design, or implementation) of the construction projects to be inspected. HDOT may use more than one qualified construction inspector for these inspections. HDOT, in consultation with DOH, shall develop and implement a standard inspection form, and reporting procedures for use in these inspections. The inspection form shall include, at a minimum, a checklist for the proper installation of BMPs specified in the BMP plan, and the reporting procedures shall include, at a minimum, notification of critical deficiencies

1 to the Director of HDOT and DOH. Upon three successive monthly
2 inspections that indicate, in total, no critical or major deficiencies or less
3 than six minor deficiencies with no more than three minor deficiencies in
4 one month in a project's BMPs or other storm water management
5 activities, HDOT may decrease the inspection frequency for such project
6 to quarterly. However, if while under a quarterly inspection frequency, an
7 inspection of a project conducted pursuant to this Paragraph indicates at
8 least one critical or major deficiency or a total of three or more minor
9 deficiencies in the project's BMPs or other storm water management
10 activities, the inspection frequency shall immediately return to no less than
11 monthly. HDOT shall further develop and implement written procedures
12 for appropriate corrective actions and follow-up inspections when an
13 inspected project is not in full compliance with this Consent Decree, the
14 HDOT MS4 permit, the Hawai'i General Construction Activities Storm
15 Water permit, or any other applicable requirements under the Hawai'i
16 NPDES permit program. The corrective action procedures shall at a
17 minimum require that (i) any critical deficiencies shall be corrected or
18 addressed before the close of business on the day of the inspection at
19 which the deficiency is identified, and (ii) any major deficiencies shall be
20 corrected or addressed as soon as possible, but in no event later than five
21 business days after the inspection at which the deficiency is identified or
22 before the next forecasted precipitation, whichever is sooner.

23 (b) All encroachment permit construction projects shall be
24 inspected at least once during the life of the project, and any project of the
25 types listed immediately below shall be inspected at least annually if it
26 continues longer than one year's duration:
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- 1) Housing/commercial development improvements which include large roadway and utility improvements or any grading within HDOT's rights-of-way;
- 2) Utility main installation (waterlines, sewerlines, underground electrical lines, etc.);
- 3) Landscape/irrigation installation (e.g. median beautification projects); and
- 4) Drainline connections.

All inspections shall be conducted by a qualified construction inspector. HDOT may use more than one qualified construction inspector for these inspections. HDOT, in consultation with DOH, shall develop and implement a standard inspection form and reporting procedures for use in these inspections. The inspection form shall include, at a minimum, a checklist for the proper installation of BMPs specified in the BMP plan, and the reporting procedures shall include, at a minimum, notification of any critical deficiencies to the Director of HDOT and DOH. HDOT shall further develop and implement written procedures for appropriate corrective actions and follow-up inspections when an inspected project is not in full compliance with this Consent Decree, the HDOT MS4 permit, or the Hawai'i General Construction Activities Storm Water permit.

h. Erosion Control Best Management Practices Program. HDOT shall revise its SWMPP as follows:

- (1) HDOT shall include water quality impacts as a priority in selecting projects for erosion control improvements, ensuring that erosional areas with the potential for significant water quality impact, but with limited public safety concerns, are also considered a high priority for remediation. Erosional areas with the potential for significant water quality impact shall include areas where there is evidence of rilling or gullyng or other evidence of significant sediment transport

1 and that are located within High Priority Watersheds. HDOT shall identify and
2 implement erosion control projects based on water quality concerns while
3 continuing to address high profile public safety projects.

4 (2) HDOT shall require the prompt implementation of temporary
5 erosion control measures (e.g., erosion control blankets or fabrics, gravel bags,
6 and silt fence/fiber rolls) on the erosional areas with the potential for significant
7 water quality impact identified in the preceding Subparagraph if a permanent
8 solution is not immediately possible.

9 (3) HDOT shall modify the list of approved erosion and sediment
10 control BMPs to include, at a minimum, at least all of those contained in the CCH
11 Manual. The revised SWMPP shall also provide for the implementation of
12 alternative erosion and sediment control BMPs where appropriate.

13 (4) HDOT shall undertake a program to evaluate the erosional
14 potential of storm drain system outlets that discharge downslope of the roadbed.
15 Where discharge points are observed to be creating erosional conditions, HDOT's
16 program shall require installation of velocity dissipaters or other BMPs to reduce
17 the risk of continued erosion at these locations.

18 i. Maintenance Facilities BMP Program. HDOT shall develop and
19 implement a written set of maintenance BMPs for routine and emergency in-house
20 activities. Activity-specific BMPs shall be organized as a manual and be created in a
21 format that facilitates its use by field staff. It shall be distributed to all field staff and
22 shall complement the overall goals of the BMPPP.

23 j. New Development and Significant Redevelopment BMP Program Plan.
24 HDOT shall revise its SWMPP to add the following additional permanent post-
25 construction BMPs to the current list in Section 3 of the New Development and
26 Significant Redevelopment BMP Program Plan (Section VIII M of the December 2003
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1 SWMPP); infiltration basins, infiltration trenches, media filters, Continuous Deflective
2 Separation (CDS) units, and similar technologies.

3 k. Illicit Connection / Illegal Discharge Elimination Program. HDOT shall
4 revise its SWMPP as follows:

5 (1) HDOT shall develop procedures for identifying and responding to
6 possibly illicit connections and illegal discharges. These procedures shall include,
7 but not be limited to, specific time deadlines for responding to identified
8 discharges. Such identification and response procedures shall be coordinated with
9 the inspection procedures required under the revised Debris Removal Best
10 Management Practices Program set forth in Paragraph 10.f, above.

11 (2) HDOT shall develop a program to conduct inspections of industrial
12 and commercial holders of connection and discharge permits to its MS4. This
13 industrial/commercial inspection program shall include scheduling inspections
14 such that each industrial facility is inspected at least once every five years. Any
15 industrial facility that does not have NPDES permit coverage under the Hawai'i
16 NPDES permit program shall be reported to DOH no later than 30 days after the
17 inspection date. Commercial dischargers are to be ranked according to relative
18 risk of discharge of contaminated runoff to HDOT's MS4. The highly ranked
19 commercial facilities shall be inspected at least once every 5 years. This
20 industrial/commercial inspection program shall be updated as appropriate to
21 reflect the outcomes of the investigations discussed in the preceding
22 Subparagraph.

23 11. Highways Division Construction Activities on Other Islands. On a statewide
24 basis HDOT shall implement all of the revised construction program activities requirements
25 pursuant to Paragraphs 9.b, 10.g.(1), and 10.g.(2)(a), above, and all of the revised New
26 Development and Significant Redevelopment project activities requirements pursuant to
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1 Paragraphs 9.f and 10.j, above, on all HDOT construction projects (including contract and in-
2 house projects) that are subject to NPDES storm water permit requirements, except that
3 references in Paragraph 10.g.(1) to the CCH "Rules for Soil Erosion Standards and Guidelines"
4 (April 1999) shall be modified to require use and adoption of each county's comparable and
5 applicable standards. The time deadlines contained in the referenced Paragraphs shall apply on
6 the Other Islands under this Paragraph.

7 Airports Division

8 Airport Tenant Inspections and Enforcement

9 12. Within 90 days after entry of this Decree, HDOT shall submit to EPA and DOH a
10 written program of procedures for airport tenant inspection and enforcement that shall be used at
11 Honolulu International, Lihue, and Kahului airports, in accordance with the requirements of this
12 Paragraph. HDOT shall implement the procedures upon their submission to and approval by
13 EPA and DOH. HDOT shall make modifications as requested EPA and DOH, in accordance
14 with the requirements of Section III (Approval Process). This tenant inspection and enforcement
15 program shall provide, at a minimum, for the following:

16 a. HDOT shall develop procedures and schedules for inspections of all
17 airport tenants, including all those located away from the airports proper (e.g., on Aolele
18 and Ualena Streets in Honolulu). At each airport, HDOT shall rank each tenant for its
19 relative potential either to contribute pollutants to storm water runoff or to have a non-
20 storm water discharge either into the airport storm sewer system or otherwise into waters
21 of the United States. Rankings shall be made on a low/medium/high threat basis.
22 Tenants that have separate NPDES permit coverage shall always be ranked as high threat.
23 At least once each calendar year, HDOT shall review its tenant lists and these rankings
24 and update them as necessary. This updated list shall be submitted as part of HDOT's
25 Annual Report.

26 b. HDOT shall inspect each tenant/facility in each ranking class as follows:
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1 (1) High ranked tenants, other than those that have separate NPDES
2 permit coverage, shall be inspected at least quarterly.

3 (2) High ranked tenants that have separate NPDES permit coverage
4 shall be inspected at least annually. HDOT shall submit a copy of each report of
5 these inspections to DOH within 30 days of the date of the inspection.

6 (3) Medium ranked tenants shall be inspected at least annually.

7 (4) Low ranked tenants shall be inspected at least biennially.

8 (5) HDOT shall inspect each of its airport maintenance baseyards at
9 least quarterly. HDOT shall submit a copy of each report of these inspections to
10 DOH within 30 days of the date of the inspection.

11 c. Procedures for inspection of airport tenants and maintenance yards shall
12 require a written record of the inspection such as either a checklist or form. At a
13 minimum, such checklist or form shall for each inspection identify: facility name,
14 address, contact name, contact telephone number, and SIC code; inspection date;
15 inspector name; BMPs evaluated; inspection findings; and recommended follow-up
16 actions. Copies of all inspection reports shall be maintained for a minimum of 5 years
17 and shall be made available to EPA or DOH upon request.

18 d. Procedures for enforcement against tenants with inadequate BMPs or non-
19 storm water discharges shall include identification of a range of enforcement responses
20 available to HDOT, clear guidelines for selection of an enforcement response appropriate
21 to the tenant deficiency at issue, guidelines for escalating the initial enforcement response
22 for multiple or repeated violations, and follow-up inspections to ensure the problems have
23 been corrected.

24 e. HDOT shall develop procedures for training of HDOT and contract
25 management staff charged with implementing or overseeing airport tenant inspection and
26 enforcement activities.

1 13. Resources. HDOT shall take all actions to ensure that it has adequate resources,
2 including contracting resources, to comply with all requirements of both this Consent Decree and
3 its NPDES permits. Such actions shall include, but not be limited to, accurately assessing
4 resource needs, communicating these needs to the Director of HDOT, making timely budget
5 requests of the legislature, and notifying the legislature of the terms and requirements of this
6 Consent Decree and HDOT's NPDES permits. The human resources necessary to carry out the
7 requirements of this Consent Decree and HDOT's NPDES permits may be comprised of either
8 HDOT employees or contractors or both.

9 14. Reporting. For the first year after entry of this Consent Decree, HDOT shall
10 submit quarterly reports to EPA and DOH that shall include the following information for the
11 past quarter. The first quarterly report shall be due 60 days after the end of the first complete
12 quarter following entry of this Consent Decree. All other reports shall be submitted no later than
13 45 days after the last day of each calendar quarter. After submittal of the fourth quarterly report
14 referenced above HDOT shall, for the duration of this Decree, submit semiannual reports.
15 Semiannual reports shall be due on August 31st and February 28th and shall cover the six month
16 periods ending on June 30th and December 31st, respectively. HDOT may submit separate
17 quarterly and semiannual reports for the Airports and Highways Divisions. All reports shall, at a
18 minimum, include the following information:

19 a. Oahu District MS4 Activities

20 (1) Storm Water Contact Coordination Meetings

21 The number, dates, and names of attendees of each monthly Storm
22 Water Contact Coordination meetings;

23 (2) Debris Removal Program Activities

24 (a) Specific highway segments (with dates) inspected for
25 sweeping needs;

26 (b) Specific highway segments swept, frequency of sweeping,
27 and the total amount of debris removed;

28 (c) Specific (by Milepost or other identifier) storm drainage
 system catch basins, gutters and open ditches, trenches, and sewers
 inspected, by specific highway segment and date;

 (d) Specific (by Milepost or other identifier) storm drainage
 system catch basins, gutters and open ditches, trenches, and sewers
 cleaned, the date(s) of cleaning, and the nature and total amount of debris
 removed;

(e) Number and dates of debris removal program trainings, types of trainings, and attendees participating in each; and

(f) Activities undertaken toward development and utilization of the asset management system;

(3) Construction Program Activities

(a) Total number of contract projects in the planning or design stages and total number of projects for which permanent post-construction BMP review was completed;

(b) Total number of contract project contracts put out to bid, total number awarded, total number of contract project NPDES permit verifications and BMP plans reviewed, and total number of pre-construction BMP verification inspections;

(c) Total number of in-house project NPDES permit verifications and BMP plans reviewed and total number of pre-construction BMP verification inspections;

(d) Total number of active construction projects and the total number of storm water inspections, specifying project type (contract, in-house, permit); and

(e) Number and dates of construction program trainings, types of trainings, and attendees participating in each;

(4) Chemical Applications Program Activities

Number and dates of chemical applications program trainings, types of trainings, and attendees participating in each;

(5) Erosion Control Program Activities

(a) Number of erosional problem areas with a potential for significant water quality impact identified, the number stabilized (permanently or temporarily) or otherwise remediated, and a revised schedule for stabilizing or otherwise remediating the remaining areas; and

(b) Number and dates of erosion control program trainings, types of trainings, and attendees participating in each;

(6) Maintenance Facility Program Activities

(a) Dates and locations and a summary of findings of maintenance facility oversight inspections; and

(b) Number and dates of maintenance facility trainings, types of trainings, and attendees participating in each;

(7) New Development and Significant Redevelopment Program Activities

(a) Number of project designs reviewed for appropriate inclusion of permanent post-construction BMPs; and

(b) Number and dates of New Development and Significant Redevelopment Program Activities trainings, types of trainings, and attendees participating in each;

(8) Illicit Connection / Illegal Discharge Elimination Program Activities

(a) Total number of completed follow-up investigations of discharging industrial, commercial, and high-density residential parcels;

(b) Total number of inspections of industrial and commercial dischargers to HDOT's right-of-way; and

(c) Number and dates of IC/ID Program Activities trainings, types of trainings, and attendees participating in each;

b. Statewide Highway Construction Activities

(1) Total number of contract projects in the planning or design stages and total number of projects for which permanent post-construction BMP review was completed;

(2) Total number of contract project contracts put out to bid, total number awarded, total number of contract project NPDES permit verifications and BMP plans reviewed, and total number of pre-construction BMP verification inspections;

(3) Total number of in-house project NPDES permit verifications and BMP plans reviewed and total number of pre-construction BMP verification inspections;

(4) Total number of active construction projects and the total number of storm water inspections, specifying project type (contract and in-house); and

(5) Number and dates of construction program trainings, types of trainings, and attendees participating in each;

c. Airports Division

(1) A listing of each tenant, its relative pollutant risk ranking, date(s) on which it was inspected by HDOT, and types of enforcement response actions taken against any tenant, including dates and any required follow-up activities; and

(2) Number and dates of tenant inspection and enforcement program trainings, types of trainings, and attendees participating in each.

15. Responsibility for Acts of Contractors or Agents. HDOT shall be responsible for ensuring that work is performed in accordance with the requirements of this Decree, even if that work is performed by contractors, subcontractors, or agents. HDOT shall provide a copy of this Decree to all Managers, employees, contractors, subcontractors, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor specifically retained to perform work required under this Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this the Decree. In any action to enforce this Consent Decree, HDOT shall not raise as a defense the failure by any of its Managers, employees, agents, contractors, or subcontractors to take any actions necessary to comply with the provisions of this Decree.

VI. CIVIL PENALTY

16. Civil Penalty. Within 30 days after entry of this Consent Decree, HDOT shall pay a civil penalty of \$1,000,000.00, plus interest from the date the penalty is due. Interest shall be calculated in accordance with 28 U.S.C. § 1961. Interest shall continue to accrue until payment is made. The Civil Penalty payment shall be allocated with \$600,000, plus accrued interest, if

any, being paid to the United States and \$400,000, plus accrued interest, if any, being paid to DOH.

17. Method of Payment.

a. Payment shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice in accordance with instructions to be provided to HDOT, following lodging of the Consent Decree, by the Financial Litigation Unit of the U.S. Attorney’s Office for the District of Hawai`i. At the time of payment, HDOT shall simultaneously send written notice of payment and a copy of any transmittal documentation (which should reference DOJ case number 90-5-1-1-07488 and the civil action number of this case) to the United States in accordance with Section XIV (Notification).

b. Payment shall be made by cashier’s or certified check made payable to the State of Hawai`i. At the time of payment, Defendant shall simultaneously send written notice of payment and a copy of any transmittal documentation (which should reference the civil action number of this case) to the Parties in accordance with Section XIV (Notification).

VII. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

18. HDOT shall implement a Supplemental Environmental Project (“SEP”), consisting of an Audit and Environmental Management System (“EMS”)(“the EMS SEP”), to be performed in accordance with the provisions of Appendix E to this Consent Decree, which is attached hereto and incorporated into this Decree by reference. In implementing the SEP, HDOT shall spend not less than \$1,062,500 in Eligible SEP costs. Eligible SEP costs include the costs of planning and implementing the SEP, but do not include any costs associated with corrective actions needed for compliance actions identified under the EMS.

19. HDOT shall implement a SEP consisting of “Erosion and Sediment Control for Highways” Compliance Assistance Workshops for contractors of professional services and for

1 contractors of construction services on the islands of Hawai'i (in Hilo and Kona), Kauai, Maui,
2 and Oahu (in Honolulu and Kapolei)("the Compliance Assistance Workshops SEP"). These
3 Compliance Assistance Workshops shall be developed and implemented in accordance with the
4 provisions of Appendix F to the Consent Decree which is attached hereto and incorporated into
5 this Decree by reference. In implementing the SEP, HDOT shall spend not less than \$60,000 in
6 Eligible SEP costs. Eligible SEP costs are limited to the costs to perform the tasks described in
7 Appendix F, and do not include any costs associated with developing the workshop curriculum.

8 20. With regard to each SEP, HDOT certifies the truth and accuracy of each of the
9 following:

10 a. that, as of the date of executing this Decree, HDOT is not required to
11 perform or develop the SEP by any federal, state, or local law or regulation and is not
12 required to perform or develop the SEP by agreement, grant, or as injunctive relief
13 awarded in any other action in any forum;

14 b. that the SEP is not a project that HDOT was planning or intending to
15 construct, perform, or implement other than in settlement of the claims resolved in this
16 Decree;

17 c. that HDOT has not received, and is not negotiating to receive, credit for
18 the SEP in any other enforcement action; and

19 d. that HDOT will not receive any reimbursement for any portion of the SEP
20 from any other person.

21 21. EMS SEP Completion Report. Within 30 days after HDOT concludes that the
22 EMS SEP has been fully implemented in accordance with the requirements of this Decree,
23 HDOT shall submit to the Parties in accordance with Section XIV of this Consent Decree
24 (Notification) a SEP Completion Report. The SEP Completion Report shall contain the
25 following information:

26 a. A detailed description of the SEP as implemented;

b. A description of any problems encountered in completing the SEP and the solutions thereto;

c. An itemized list of all Eligible SEP costs and acceptable evidence of such costs; and

d. Certification that the SEP has been fully implemented pursuant to the provisions of this Decree and Appendix E.

22. EPA may, in its sole discretion, require information in addition to that contained in Defendants' initial SEP Completion Report, in order to determine the adequacy of SEP completion or eligibility of SEP costs, and Defendants shall provide such information.

23. After receiving the SEP Completion Report, the United States (after consultation with DOH) shall notify HDOT whether or not it has satisfactorily completed the EMS SEP. If the SEP has not been satisfactorily completed in accordance with this Decree and Appendix E, or if the amount expended on performance of the SEP is less than the amount set forth in Paragraph 18, above, Stipulated Penalties may be assessed under Section VIII of this Consent Decree.

24. **Compliance Assistance Workshops SEP Completion Report.** Within 30 days after HDOT concludes the final Compliance Assistance Workshop, HDOT shall submit to the Parties in accordance with Section XIV of this Consent Decree (Notification) a SEP Completion Report. The SEP Completion Report shall contain the following information:

a. A detailed description of the SEP as implemented;

b. An itemized list of all Eligible SEP costs and acceptable evidence of such costs; and

c. Certification that the SEP has been fully implemented pursuant to the provisions of this Decree and Appendix F.

25. DOH may, in its sole discretion, require information in addition to that contained in Defendants' initial SEP Completion Report, in order to determine the adequacy of SEP completion or eligibility of SEP costs, and Defendants shall provide such information.

26. After receiving the SEP Completion Report, the DOH (after consultation with United States) shall notify HDOT whether or not it has satisfactorily completed the Compliance Assistance Workshops SEP. If the SEP has not been satisfactorily completed in accordance with this Decree and Appendix F, or if the amount expended on performance of the SEP is less than the amount set forth in Paragraph 19, above, Stipulated Penalties may be assessed under Section VIII of this Consent Decree.

27. Disputes concerning the satisfactory performance of each SEP may be resolved under Section X of this Decree (Dispute Resolution). No other disputes arising under this Section shall be subject to Dispute Resolution.

28. Each submission required under this Section shall be signed by an official with knowledge of the SEP and shall bear the certification language set forth in Paragraph 8, above.

29. Any public statement, oral or written, in print, film, or other media, made by HDOT making reference to the SEP under this Decree shall include the following language: “This project was undertaken in connection with the settlement of an enforcement action, United States and State of Hawai‘i v. Hawai‘i Department of Transportation, taken on behalf of the U.S. Environmental Protection Agency and the Hawai‘i Department of Health under the Clean Water Act.”

VIII. STIPULATED PENALTIES

30. Stipulated Penalty Amounts. If HDOT fails to comply fully and timely with the requirements of this Decree, including the compliance dates for each and every measure set forth in Section V (Injunctive Relief) and Section VII (Supplemental Environmental Projects), and with all requirements set forth in any applicable permits, HDOT shall pay Stipulated Penalties in the following amounts:

a. for each failure to submit a Notice of Intent or otherwise obtain a permit, failure to prepare a Site-Specific BMP Plan, or failure to have the Site-Specific BMP Plan available at a construction site: \$1,000 per day per violation;

1 b. for each failure in developing a SWPCP for any location in accordance
2 with applicable permits and guidance documents: \$800 per violation;

3 c. for failure to install a BMP specified by the Site-Specific BMP Plan or
4 permit: \$2,000 per day per violation;

5 d. for each failure to properly install or maintain appropriate BMPs in
6 accordance with applicable plans, permits, and guidance documents: \$1,500 per day per
7 violation;

8 e. for failure to conduct the inspections required by Paragraphs 9.a.(2),
9 9.b.(5), 9.e.(1), 10.f, 10.g.(2), 10.k.(2), 11, and 12 above: \$1,000 for each of the first ten
10 violations; \$2,500 for each of the next ten violations; and \$5,000 for each subsequent
11 violation;

12 f. for failure to provide reports required pursuant to Paragraphs 10.e and 14:
13 \$500 per day for the first ten days of each violation; \$1,000 per day for the next ten days
14 of each violation; and \$2,500 per day for each subsequent day of violation;

15 g. for each failure to timely submit or re-submit plans for approval in
16 accordance with Section III (Approval Process): \$500 for each day of violation;

17 h. for each failure to conduct or document the training required by
18 Paragraphs 9.b.(2), 9.c, 9.e, 10.c, 11, and 12.e above: \$1,000;

19 i. for failure to pay the civil penalty or accrued interest: \$1,000 for each day
20 that the payment is late;

21 j. for failure to timely submit the documents required by the SEP pursuant to
22 Section VII of this Decree and Appendix E: \$500 per day per violation;

23 k. for failure to timely submit a draft workshop outline as described in
24 Appendix F: \$500 per day;

25 l. for each failure to offer a workshop: \$5,000; and
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m. for each failure to timely submit the documents required by the SEP pursuant to Section VII of this Decree and Appendix F: \$500 per day per violation.

31. EMS SEP Compliance: If HDOT's total Eligible SEP Costs are less than \$1,062,500 in connection with the performance of the EMS SEP described in Appendix E to this Consent Decree, or if the SEP has not been satisfactorily completed, HDOT shall be liable for stipulated penalties as set forth below. If HDOT has halted or abandoned the completion of the SEP, such penalties shall accrue from the date of abandonment or the date set for completion of the SEP, whichever is earlier.

a. If the SEP has been satisfactorily completed but HDOT's total Eligible SEP Costs are less than \$1,062,500, HDOT shall pay stipulated penalties at the rate of 100% for every one dollar that HDOT's total Eligible SEP Costs are less than \$1,062,500.

b. If the SEP has not been satisfactorily completed, HDOT shall pay stipulated penalties at the rate of 150% for every one dollar that HDOT's total Eligible SEP Costs are less than \$1,062,500. If the SEP has not been satisfactorily completed but HDOT's total Eligible SEP Costs for the SEP are equal to or exceed \$1,062,500, HDOT shall not be liable for any stipulated penalties for the SEP if HDOT has made good faith and timely efforts to complete the SEP and certifies with supporting documentation, no later than the date that HDOT is required to submit a SEP Completion Report, that it has spent at least \$1,062,500 in Eligible SEP Costs. If HDOT does not provide the certification and the documentation required by this Subparagraph, or if the documentation provided does not support HDOT's certification, HDOT shall be deemed to be in violation of this Consent Decree and shall pay stipulated penalties of \$25,000.

32. Compliance Assistance Workshops SEP Compliance: If HDOT's total Eligible SEP Costs are less than \$60,000 in connection with the performance of the Compliance Assistance Workshops SEP described in Appendix F to this Consent Decree, or if the SEP has

1 not been satisfactorily completed, HDOT shall be liable for stipulated penalties as set forth
2 below. If HDOT has halted or abandoned the completion of the SEP, such penalties shall accrue
3 from the date of abandonment or the date set for completion of the SEP, whichever is earlier.

4 a. If the SEP has been satisfactorily completed but HDOT's total Eligible
5 SEP Costs are less than \$60,000, HDOT shall pay stipulated penalties at the rate of 100%
6 for every one dollar that HDOT's total Eligible SEP Costs are less than \$60,000.

7 b. If the SEP has not been satisfactorily completed, HDOT shall pay
8 stipulated penalties at the rate of 150% for every one dollar that HDOT's total Eligible
9 SEP Costs are less than \$60,000. If the SEP has not been satisfactorily completed but
10 HDOT's total Eligible SEP Costs for the SEP are equal to or exceed \$60,000, HDOT
11 shall not be liable for any stipulated penalties for the SEP if HDOT has made good faith
12 and timely efforts to complete the SEP and certifies with supporting documentation, no
13 later than the date that HDOT is required to submit a SEP Completion Report, that it has
14 spent at least \$60,000 in Eligible SEP Costs. If HDOT does not provide the certification
15 and the documentation required by this Subparagraph, or if the documentation provided
16 does not support HDOT's certification, HDOT shall be deemed to be in violation of this
17 Consent Decree and shall pay stipulated penalties of \$25,000.

18 33. Accrual of Stipulated Penalties. Stipulated Penalties under this Section shall
19 begin to accrue on the day after performance is due or on the day a violation occurs, whichever is
20 applicable, and shall continue to accrue until performance is satisfactorily completed or until the
21 violation ceases. Stipulated Penalties shall accrue simultaneously for separate violations of this
22 Consent Decree. Penalties shall accrue regardless of whether HDOT has been notified of a
23 violation but need not be paid until a demand is made. HDOT shall pay any Stipulated Penalty
24 within 30 days of receiving written demand therefor.

25 34. Demand. The United States or DOH, or both, may seek Stipulated Penalties
26 under this Section. Where both sovereigns seek Stipulated Penalties for the same violation of
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1 this Consent Decree, HDOT shall pay 60% of total Stipulated Penalties to the United States and
2 40% to DOH. Where only one sovereign demands Stipulated Penalties for a violation, it shall
3 make that demand on its own behalf, and HDOT shall pay the full amount of the Stipulated
4 Penalties due for the violation to that sovereign.

5 35. Waiver of Stipulated Penalties. The United States or DOH may, in the
6 unreviewable exercise of its discretion, reduce or waive Stipulated Penalties otherwise due that
7 sovereign under this Consent Decree. The determination by one sovereign not to seek Stipulated
8 Penalties, or subsequently to waive or reduce the amount it seeks, shall not preclude the other
9 sovereign from seeking Stipulated Penalties.

10 36. Payment. HDOT shall, as directed by the United States in its demand, pay
11 Stipulated Penalties owing to the United States by EFT in accordance with Section VI (Civil
12 Penalty), Paragraph 17.a, above, or by certified or cashier's check in the amount due, payable to
13 the "U.S. Department of Justice," referencing DOJ No. 90-5-1-1-07488 and United States
14 Attorney's Office file number [REDACTED], and delivered to the office of the United States
15 Attorney, District of Hawai'i, Room 6-100, PJKK Federal Building, 300 Ala Moana Boulevard,
16 Honolulu, Hawai'i 96850. Any payment of Stipulated Penalties shall be accompanied by a
17 transmittal memorandum referencing DOJ No. 90-5-1-1-07488 and United States Attorney's
18 Office file number [REDACTED] and stating that payment of Stipulated Penalties is being
19 made. HDOT shall pay any Stipulated Penalties owing to DOH according to the provisions of
20 Section VI (Civil Penalty), Paragraph 17.b.

21 37. Interest. If HDOT fails to pay Stipulated Penalties according to the terms of this
22 Consent Decree, HDOT shall be liable for interest on such penalties, as provided for in 28 U.S.C.
23 § 1961, accruing as of the date payment became due.

24 38. No Effect on Obligation to Comply. The payment of Stipulated Penalties shall
25 not alter in any way HDOT's obligation to comply with the requirements of this Decree.

39. No Waiver of Other Remedies. Subject to the provisions of Section XII of this Consent Decree (Effect of Settlement), the Stipulated Penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States and DOH for HDOT's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of the Clean Water Act, HDOT shall be allowed a credit, for any Stipulated Penalties paid, against any statutory penalties imposed for such violation.

40. Effect of Dispute Resolution. Stipulated Penalties shall continue to accrue during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, HDOT shall pay accrued Stipulated Penalties, if any, determined to be owing to the United States and DOH within 15 business days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to the Court and the United States and DOH prevail in whole or in part, HDOT shall pay all accrued Stipulated Penalties determined by the Court to be owed to the United States and DOH within 30 days of receipt of the Court's decision or order, except as provided in Subparagraph c, below;

c. If the District Court's decision is appealed by HDOT or by the United States and DOH, HDOT shall pay all accrued Stipulated Penalties determined by the District Court to be owing to the United States and DOH into an interest-bearing escrow account within 30 days of receipt of the Court's decision or order. Stipulated Penalties shall be paid into this account as they continue to accrue, at least every 30 days. Within 15 business days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States and DOH, or to HDOT, in accordance with the court's mandate.

IX. FORCE MAJEURE

1 41. Definition of Force Majeure. A “Force Majeure” event is any event beyond the
2 control of HDOT, its contractors, or any entity controlled by HDOT that delays the performance
3 of any obligation under this Consent Decree despite HDOT’s best efforts to fulfill the obligation.
4 “Best efforts” includes anticipating any potential Force Majeure event and addressing the effects
5 of any such event (a) as it is occurring, and (b) after it has occurred, to prevent or minimize any
6 resulting delay to the greatest extent possible. In no case shall any of the following circum-
7 stances give rise to a claim of Force Majeure: unanticipated or increased costs or expenses
8 associated with implementation of this Decree or changed financial circumstances; failure to
9 apply for a required permit or approval, or to provide in a timely manner all information required
10 to obtain a permit or approval, that is necessary to meet the requirements of this Decree; failure
11 by HDOT to approve contracts; failure by HDOT to secure federal funding; or failure by HDOT
12 to fill all staffing positions.

13 42. Required Notification. HDOT shall notify EPA and DOH orally or by electronic
14 or facsimile transmission as soon as possible, but not later than 72 hours after the time HDOT
15 first knew of, or in the exercise of reasonable diligence under the circumstances should have
16 known of, any event that might delay completion of any requirement of this Decree, whether or
17 not the event is a Force Majeure event. HDOT shall make the oral notification to the United
18 States required by this Paragraph by calling Kathi Moore, the Chief of the Clean Water
19 Compliance Office; in the event that HDOT is unable to reach Kathi Moore, such notification
20 may be effective if HDOT leaves a detailed message explaining that notice is being provided
21 pursuant to this Paragraph. HDOT shall make oral notification to DOH by calling Denis Lau, the
22 Chief of the Clean Water Branch. The United States and DOH may designate alternative
23 representatives to receive oral notification at their discretion by sending HDOT a written
24 designation in accordance with Section XIV (Notification). Within 7 days of providing oral
25 notice, HDOT shall provide written notice by facsimile with hard copy to follow to EPA and
26 DOH. The written notice HDOT submits pursuant to this Paragraph shall indicate whether
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1 HDOT claims that the delay should be excused due to a Force Majeure event. The written notice
2 shall describe in detail the basis for HDOT's contention that it has experienced, or may
3 experience, a Force Majeure delay (if it intends to make such a claim); the anticipated length of
4 the delay; the precise cause or causes of the delay; and the measures taken or to be taken to
5 prevent or minimize the delay and the timetable by which those measures will be implemented.
6 Failure to comply with the procedures of this Paragraph shall preclude HDOT from asserting any
7 claim of Force Majeure.

8 43. Procedures for Extension. If the United States agrees that a Force Majeure event
9 has occurred or will occur, the United States may agree to extend the time for HDOT to perform
10 the affected requirements for the time necessary to complete those obligations. An extension of
11 time to perform the obligations affected by a Force Majeure event shall not, by itself, extend the
12 time to perform any other obligation. Where the United States agrees to an extension of time, the
13 appropriate modification shall be made pursuant to Section XV of this Consent Decree
14 (Modification).

15 44. Dispute Resolution. If the United States does not agree that a Force Majeure
16 event has occurred, or does not agree to the extension of time sought by HDOT, the United
17 States' position shall be binding, unless HDOT invokes Dispute Resolution under Section X of
18 this Consent Decree. In any such dispute, HDOT bears the burden of proving, by a prepon-
19 derance of the evidence, that each claimed Force Majeure event is a Force Majeure event; that
20 HDOT gave the notice required by Paragraph 42, above; that the Force Majeure event caused any
21 delay HDOT claims was attributable to that event; and that HDOT exercised best efforts to
22 prevent or minimize any delay caused by the event.

23 **X. DISPUTE RESOLUTION**

24 45. Exclusive Remedy. Unless otherwise expressly provided for in this Decree, the
25 dispute resolution procedures of this Section shall be the exclusive mechanism to resolve
26 disputes between HDOT and the United States and DOH arising under this Decree. However,
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1 the procedures set forth in this Section shall not apply to actions by the United States or DOH to
2 enforce obligations of HDOT that have not been disputed in accordance with this Section. The
3 procedures set forth in this Section shall not apply to disputes between DOH and the United
4 States.

5 46. Informal Dispute Resolution. Any dispute subject to dispute resolution under this
6 Consent Decree shall first be the subject of informal negotiations. The dispute shall be
7 considered to have arisen when HDOT sends the United States and DOH a written Notice of
8 Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal
9 negotiations shall not exceed 20 days from the date the dispute arises, unless that period is
10 modified by written agreement of the United States, DOH, and HDOT. If the Parties cannot
11 resolve a dispute by informal negotiations, then the position advanced by the United States (after
12 consultation with DOH) shall be considered binding unless, within 30 days after the conclusion
13 of the informal negotiation period, HDOT invokes formal dispute resolution procedures set forth
14 in Paragraph 47, below.

15 47. Formal Dispute Resolution.

16 a. Within 30 days after the conclusion of the informal negotiation period,
17 HDOT may invoke formal dispute resolution procedures by serving on the United States
18 and DOH a written Statement of Position regarding the matter in dispute. The Statement
19 of Position shall include, but may not be limited to, any factual data, analysis, or opinion
20 supporting HDOT's position and any supporting documentation relied upon by HDOT.

21 b. The United States and DOH shall serve their Joint Statement of Position
22 within 45 days of receipt of HDOT's Statement of Position. The Joint Statement of
23 Position shall include, but may not be limited to, any factual data, analysis, or opinion
24 supporting that position and any supporting documentation relied upon by the United
25 States. The Joint Statement of Position shall be binding on HDOT, unless HDOT files a
26 motion for judicial review of the dispute in accordance with Paragraph 48, below.

1 48. Petitions to the Court. In the event that the Parties cannot resolve a dispute by
2 informal or formal negotiations as set forth above, the following procedures shall apply:

3 a. HDOT may seek judicial review of the dispute by filing with the Court and
4 serving on the United States and DOH a Motion requesting judicial resolution of the
5 dispute. The Motion shall be filed within 30 days of receipt of the Joint Statement of
6 Position set forth in Paragraph 47.b, above.

7 b. The Motion shall attach all Statements of Position and shall contain a
8 written statement of HDOT's position on the matter in dispute, including any supporting
9 factual data, analysis, opinion, and documentation, and shall set forth the relief requested
10 and any schedule within which the dispute must be resolved for orderly implementation
11 of the Consent Decree. HDOT shall serve such Motion on the United States and DOH
12 electronically and by overnight delivery.

13 c. The United States and DOH shall respond to HDOT's Motion within 30
14 days of the service of the Motion. The United States and DOH agree to serve their Joint
15 Response electronically and by overnight delivery.

16 d. HDOT may file a reply memorandum within 15 business days of service
17 of the Joint Response.

18 e. Standard and Scope of Review. In any dispute brought under this
19 Paragraph, HDOT shall bear the burden of demonstrating that its position clearly
20 complies with the Clean Water Act and the Act's implementing regulations and that
21 Defendant is entitled to relief under applicable law. The United States reserves the right
22 to argue that its position is reviewable only on the administrative record and must be
23 upheld unless arbitrary and capricious or otherwise not in accordance with law.

24 49. Effect on Other Obligations. The invocation of dispute resolution procedures
25 under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of
26 HDOT under this Consent Decree, unless and until final resolution of the dispute so provides.
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1 Stipulated Penalties with respect to the disputed matter shall continue to accrue from the first day
2 of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in
3 Paragraph 40, above. If HDOT does not prevail on the disputed issue, Stipulated Penalties shall
4 be assessed and paid as provided in Section VIII (Stipulated Penalties).

5 **XI. INFORMATION COLLECTION AND RETENTION**

6 50. The United States, DOH, and their representatives, including attorneys,
7 contractors, and consultants, shall have the right of entry into any facility covered by this Consent
8 Decree, at all reasonable times, upon presentation of credentials, to:

- 9 a. monitor the progress of activities required under this Consent Decree;
- 10 b. verify any data or information submitted to the United States or DOH in
11 accordance with the terms of this Consent Decree;
- 12 c. obtain samples and, upon request, splits of any samples taken by HDOT or
13 its representatives, contractors, or consultants;
- 14 d. obtain documentary evidence, including photographs and similar data; and
- 15 e. assess HDOT's compliance with this Consent Decree.

16 51. Upon request, HDOT shall provide EPA and DOH, or their authorized
17 representatives, splits of any samples taken by HDOT. Upon request, EPA and DOH shall
18 provide HDOT splits of any samples taken by EPA or DOH.

19 52. Until five years after the termination of this Consent Decree, HDOT shall retain,
20 and shall instruct its contractors and agents to preserve, all non-identical copies of all documents,
21 records, or other information (including documents, records, or other information in electronic
22 form) in its or its contractors' or agents' possession or control, or that come into its or its
23 contractors' or agents' possession or control, and that relates in any manner to HDOT's perfor-
24 mance of its obligations under this Consent Decree. This information-retention requirement shall
25 apply regardless of any contrary institutional policies or procedures. At any time during this
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1 information-retention period, the United States or DOH may request copies of any documents,
2 records, or other information required to be maintained under this Paragraph.

3 53. At the conclusion of the information-retention period provided in the preceding
4 Paragraph, HDOT shall notify the United States and DOH at least 90 days prior to the destruction
5 of any documents, records, or other information subject to the requirements of the preceding
6 Paragraph and, upon request by the United States or DOH, HDOT shall deliver any such
7 documents, records, or other information to EPA or DOH. HDOT may assert that certain
8 documents, records, or other information is privileged under the attorney-client privilege or any
9 other privilege recognized by federal law. If HDOT asserts such a privilege, it shall provide the
10 following: (a) the title of the document, record, or information; (b) the date of the document,
11 record, or information; (c) the name and title of each author of the document, record, or
12 information; (d) the name and title of each addressee and recipient; (e) a description of the
13 subject of the document, record, or information; and (f) the privilege asserted by HDOT.
14 However, no documents, records, or other information created or generated pursuant to the
15 requirements of this Consent Decree shall be withheld on grounds of privilege.

16 54. HDOT may also assert that information required to be provided under this Section
17 is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any
18 information that HDOT seeks to protect as CBI, HDOT shall follow the procedures set forth in
19 40 C.F.R. Part 2.

20 55. This Consent Decree in no way limits or affects any right of entry and inspection,
21 or any right to obtain information, held by the United States or DOH pursuant to applicable
22 federal or State laws, regulations, or permits, nor does it limit or affect any duty or obligation of
23 HDOT to maintain documents, records, or other information imposed by applicable federal or
24 State laws, regulations, or permits.

25 **XII. EFFECT OF SETTLEMENT**

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1 56. This Consent Decree resolves the civil claims of the United States and DOH for
2 the violations alleged in the Complaint filed in this action through the date of lodging.

3 57. The United States and DOH reserve all legal and equitable remedies available to
4 enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 56. This
5 Consent Decree shall not be construed to limit the rights of the United States or DOH to obtain
6 penalties or injunctive relief under the Act or its implementing regulations, or under other federal
7 or State laws, regulations, or permit conditions, except as expressly specified in Paragraph 56.

8 58. This Consent Decree is not a permit, or a modification of any permit, under any
9 federal, State, or local laws or regulations. HDOT is responsible for achieving and maintaining
10 complete compliance with all applicable federal, State, and local laws, regulations, and permits;
11 and HDOT's compliance with this Consent Decree shall be no defense to any action commenced
12 pursuant to any such laws, regulations, or permits. The United States and DOH do not, by their
13 consent to the entry of this Consent Decree, warrant or aver in any manner that HDOT's
14 compliance with any aspect of this Consent Decree will result in compliance with provisions of
15 the Act or its implementing regulations or with any other provisions of federal, State, or local
16 laws, regulations, or permits. Notwithstanding the United States' or DOH's review and approval
17 of any data, reports, or plans submitted pursuant to this Decree, HDOT shall remain solely
18 responsible for compliance with this Decree.

19 59. This Consent Decree does not limit or affect the rights of HDOT or of the United
20 States or DOH against any third parties, not party to this Consent Decree, nor does it limit the
21 rights of third parties, not party to this Consent Decree, against HDOT, except as otherwise
22 provided by law.

23 60. This Consent Decree shall not be construed to create rights in, or grant any cause
24 of action to, any third party not party to this Consent Decree.

25 **XIII. MISCELLANEOUS**
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1 61. Headings. Headings in this Decree are provided for convenience only and shall
2 not affect the substance of any provision.

3 62. Costs of Suit. The Parties shall bear their own costs of this action, including
4 attorneys' fees, except that the United States and DOH shall be entitled to collect the costs
5 (including attorneys' fees) incurred in any action necessary to collect any portion of the civil
6 penalty or any Stipulated Penalties due but not paid by HDOT.

7 **XIV. NOTIFICATION**

8 63. When written notification or communication is required by the terms of this
9 Decree, such notification or communication shall be addressed to the following individuals at the
10 addresses specified below (or to such other addresses as may be thereafter designated by written
11 notice to the parties):

12 As to the United States:

13 Chief, Environmental Enforcement Section
14 Environment & Natural Resources Division
15 U.S. Department of Justice
16 Box 7611, Ben Franklin Station
17 Washington, D.C. 20044-7611
18 Re: DOJ #90-5-1-1-07488

19 and

20 Kathi Moore (WTR -7)
21 Chief, CWA Compliance Office
22 U.S. EPA, Region 9
23 75 Hawthorne St.
24 San Francisco, CA 94105
25 (415) 972-3505

26 As to EPA:

27 Kathi Moore (WTR -7)
28 Chief, CWA Compliance Office
U.S. EPA, Region 9
75 Hawthorne St.
San Francisco, CA 94105
(415) 972-3505

1 As to DOH:

2 Denis Lau
3 Chief, Clean Water Branch
4 Hawai'i State Department of Health
5 919 Ala Moana Blvd., Room 301
6 Honolulu, Hawai'i 96814
7 (808) 586-4309

8 and

9 Kathleen S. Ho
10 Deputy Attorney General
11 Health and Human Services Division
12 Department of the Attorney General
13 State of Hawai'i
14 465 South King Street, Room 200
15 Honolulu, Hawai'i 96813
16 (808) 587-3062

17 As to HDOT:

18 Rodney K. Haraga
19 Director, Department of Transportation
20 869 Punchbowl Street
21 Honolulu, Hawai'i 96813
22 (808) 587-2150

23 and

24 Jeffery S. Kato
25 Deputy Attorney General
26 Land and Transportation Division
27 Department of the Attorney General
28 State of Hawai'i
465 South King Street, Room 300
Honolulu, Hawai'i 96813
(808) 587-2994

64. Notifications to or communications with HDOT, DOH, EPA, or the United States
shall be deemed submitted:

a. when required to be sent by mail, on the date they are postmarked and sent
by certified mail, return receipt requested;

b. when required to be sent by overnight delivery, on the date they are picked up by the overnight delivery service; or

c. when required to be made electronically, on the date they are sent by electronic mail with confirmation of receipt.

XV. MODIFICATION AND TERMINATION

65. Modification. The deadlines set forth in Sections V (Injunctive Relief) and VII (Supplemental Environmental Project) of this Decree may be modified, and those and other non-material modifications of this Decree shall be made by written agreement of the parties, with notification to the Court. Where any modification constitutes a material change to any term of this Decree, it shall be effective only upon written agreement of the Parties and approval by the Court.

66. Request to Terminate Decree. No sooner than 5 years after entry of this Decree, HDOT may request the United States and DOH's consent to termination of this Decree. In seeking such consent, HDOT shall provide a written report to the United States and DOH that demonstrates:

a. HDOT has paid all civil penalties, Stipulated Penalties, and interest due under this Decree;

b. There are no unresolved matters subject to Dispute Resolution pursuant to Section X (Dispute Resolution);

c. No enforcement action under this Decree is pending;

d. HDOT has fully and successfully completed the compliance requirements set forth in Section V (Injunctive Relief); and

e. HDOT has fully and successfully completed all SEP requirements set forth in Section VII.

67. Response to Request for Termination

a. If the United States and DOH agree that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

b. If the United States and DOH do not agree that the Decree may be terminated, HDOT may invoke Dispute Resolution under Section X of this Decree. However, HDOT shall not seek Dispute Resolution of any dispute regarding termination, under Paragraph 47 of Section X, until 60 days after service of its Request for Termination.

XVI. INTEGRATION

68. This Consent Decree and its Appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersede all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than the Appendices, which are attached to and incorporated in this Decree, and submittals that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XVII. APPENDICES

69. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the Definition of High Priority Watersheds;

“Appendix B” is the Highway Segments and Sweeping Frequencies

“Appendix C” is the Drainage System Inspection and Cleaning Schedule

“Appendix D” is the High Priority Areas for Erosion Control Measures

“Appendix E” is the EMS SEP

“Appendix F” is the Compliance Assistance Workshops SEP

“Appendix G” is the list of DOT Facilities with CCH Manuals

1 **XVIII. ENTRY AND FINAL JUDGMENT**

2 70. Authority to Sign Decree. The undersigned representatives of HDOT certify that
3 they are authorized to enter into and to execute this Decree and to legally bind HDOT to the
4 terms and conditions of the Decree and that they meet the requirements for authorized signatory
5 found in 40 C.F.R. § 122.22. The undersigned representatives of DOH and the United States
6 each certifies that he or she is authorized to enter into and to execute this Decree and to legally
7 bind the Party that he or she represents to the terms and conditions of the Decree.

8 71. Counterparts. This Consent Decree may be signed in counterparts, and its validity
9 shall not be challenged on that basis.

10 72. Designation of Agent for Service. HDOT shall identify on the attached signature
11 page the name and address of an agent who is authorized to accept service of process by mail on
12 HDOT's behalf with respect to all matters arising under or relating to this Decree. HDOT agrees
13 to accept service in that manner and to waive the formal service requirements of Fed. R. Civ. P. 4
14 and 5 and any applicable local rules of this Court, including, but not limited to, service of
15 summons.

16 73. Public Notice. This Consent Decree shall be lodged with the Court for a period of
17 not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The
18 United States reserves the right to withdraw or withhold its consent if the comments regarding
19 the Consent Decree disclose facts or considerations indicating that the Consent Decree is
20 inappropriate, improper, or inadequate. HDOT agrees not to oppose entry of this Consent Decree
21 by the Court or to challenge any provision of the Decree, unless the United States has notified
22 HDOT in writing that it no longer supports entry of the Decree.

23 74. Final Judgment. Upon approval and entry of this Consent Decree by the Court,
24 this Consent Decree shall constitute a final judgment of the Court as to the United States, DOH,
25 and HDOT. The Court finds that there is no just reason for delay and therefore enters this
26 judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

75. Retention of Jurisdiction. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections X and XV, or effectuating or enforcing compliance with the terms of this Decree.

SO ORDERED THIS _____ DAY OF _____, 2005

UNITED STATES DISTRICT JUDGE

1 We hereby consent to entry of the foregoing Consent Decree, subject to the Notice and Comment
2 Provisions of 28 C.F.R. § 50.7 and Paragraph 73 of this Decree:

3
4 FOR THE UNITED STATES OF AMERICA

5
6 Date: 9/27/05

7 KELLY A. JOHNSON
8 Acting Assistant Attorney General
9 Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

10
11 Date: 9/27/05

12 ANGELA O'CONNELL
13 CYNTHIA HUBER
14 Senior Attorneys
15 Environment and Natural Resources Division
16 U.S. Department of Justice
17 P.O. Box 7611
18 Washington, D.C. 20044-7611
19 (202) 514-5273
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1 We hereby consent to entry of the foregoing Consent Decree, subject to the Notice and Comment
2 Provisions of 28 C.F.R. § 50.7 and Paragraph 73 of this Decree:

3
4 Date: 28 SEP 05

GRANTA Y/NAKAYAMA
Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Ariel Rios Building, 2241-A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

9
10 Date: 14 SEP 05

WAYNE NASTRI
Regional Administrator
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105

14 OF COUNSEL:

15 LAURIE KERMISH
16 Assistant Regional Counsel
17 U.S. EPA, Region 9
18 75 Hawthorne Street
San Francisco, California 94105
(415) 972-3917

FOR THE HAWAII DEPARTMENT OF
HEALTH

Date: AUG 15 2005

Chiyome Leinaka Fukino, M.D.
Director of Health
State of Hawai'i
1250 Punchbowl Street
Honolulu, Hawai'i 96813

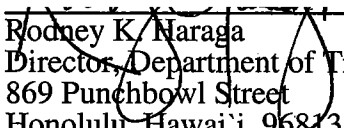
APPROVED AS TO FORM:

Kathleen S. Ho
Deputy Attorney General

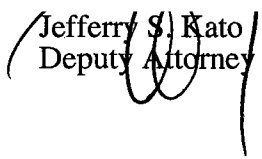
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FOR DEFENDANT, HAWAII DEPARTMENT
OF TRANSPORTATION

Date: SEP - 1 2005


Rodney K. Naraga
Director, Department of Transportation
869 Punchbowl Street
Honolulu, Hawaii 96813

APPROVED AS TO FORM:


Jeffery S. Kato
Deputy Attorney General